

Property Rights and the Environment: The Ecological Function of Property in the Brazilian Constitution



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Overview

- Sustainable Development
 - Brundtland Commission (1987) definition: “development that meets the needs of the present without compromising the ability of future generations to meet their own needs.”
- Question: How does the concept of sustainable development alter the balance between individual and societal interests?
- Application: Environmental law and property rights under the Brazilian Constitution of 1988
 - Relevant constitutional provisions
 - *Ecological* function of property, within the *social* function of property
 - Selection of cases on the issue from the High Court of Brazil (*Superior Tribunal de Justiça*)

Constitution of Brazil (1988)

- Art. 225, *chapeau*—“All have the right to an ecologically balanced environment, which is an asset of common use and essential to a healthy quality of life, and both the Government and the community shall have the duty to defend and preserve it for present and future generations.”
- Art. 5—“All are equal before the law, without distinction of any kind, guaranteeing to Brazilians and foreigners residing in the Country the inviolability of the right to life, liberty, equality, security, and property, under the following terms:
 - XXII – the right to property is guaranteed;
 - XXIII – property shall fulfill its social function;

Constitution of Brazil (1988)

- Social function of property—requirements for rural property listed in Art. 186:
 - Rational and adequate use;
 - Adequate use of available natural resources and preservation of the environment;
 - Compliance with the provisions that regulate labor relations;
 - Exploitation that favors the well-being of the owners and laborers
- Article 170—the principles that govern the economic order of Brazil:
 2. Private property
 3. The social function of property
 6. Protection of the environment, including through differential treatment of goods and services according to their environmental impact . . .

Ecological Function of Property

- These constitutional provisions, taken together, suggest an ecological function of property within the social function

High Court of Brazil (*Superior Tribunal de Justiça*)

- Created in 1988 by the new Constitution
- Highest court in Brazil for questions not involving the Constitution
 - Responsible for standardizing interpretation of federal law
- Original and appellate jurisdiction
 - Most common form of appeal: Special Appeal (*Recurso Especial*)

Case Examples

- How does the principle of the *ecological function of property* affect the relationship between property law and environmental law in judicial decisions?
- Theory & practice: the *ecological function of property* as an example of a sustainable development-centered norm in property law

Atlantic Forest Case (STJ 2009)

- Issue: did an executive decree that restricted the cutting of Atlantic Forest vegetation constitute a compensable taking?
- How does the Brazilian Constitution affect our understanding of property?
 - “[C]ontemporary judicial regimes require that real property—rural or urban—serve *multiple ends* (private and public, including ecological), which means that its economic utility is not exhausted on *one single use* or the *best use*, let alone the *most lucrative use*.”

Atlantic Forest Case (STJ 2009)

- Inverting the notion of a government “taking”
 - “If landowners and occupiers are subject to the social and ecological functions of property, it makes no sense to claim as unjust the loss of something that, under the constitutional and legal regime in effect, they never had, that is, the possibility of complete, absolute use, in scorched-earth style, of the land and its natural resources. Rather, making such claim would be an illegal takeover . . . of the *public attributes* of private property (essential ecological processes and services), which are ‘assets of common use’” as described in the Constitution.

Billings Reservoir Case (STJ 2006)

- Removal of an illegal housing development near a reservoir that serves the Greater São Paulo area
- Tension between ecological function of property and human dignity?

Billings Reservoir Case (STJ 2006)

- “There is clearly a social factor that weighs on the decision—the removal of families residing clandestinely in the area

This case is not a matter of wanting to preserve a few trees at the expense of needy families that were probably deceived by the project developers in the hope of obtaining a place to live with dignity, but rather of preserving an urban reservoir that benefits a far greater number of people than those living in the preserved area. Thus, the **public interest must prevail over the private**, given that, *in casu*, there is no way to satisfactorily reconcile the two. Evidently, fulfilling the court’s order will cause suffering for those people affected, however, it will avoid greater suffering by a greater number of people in the future, and this cannot be ignored.”

Conclusions

- Constitutionalization of environmental rights in Brazil—provides a solid legal framework for applying sustainable development as a normative concept
- Questions to consider:
 - Who bears the cost of the ecological function of property?
 - How could this concept be applied in other countries?

